Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 341.

FREDERICH HOENINGHAUS and HENRY W. CURTISS,
Appellants,

vs.

THE UNITED STATES.

The cause above entitled comes before this Court on a certificate for instructions from the U. S. Circuit Court of Appeals for the Second Circuit, and calls for the construction of a portion of Section 7 of the Customs Administrative Act of June 10th, 1890, as amended by Section 32 of the Tariff Act of July 24, 1897.

Statement of Facts.

The facts are so concisely stated in the record, which consists of only eleven folios, that it will not be practicable to abridge the statements therein contained to any great extent, but we shall attempt to make a brief summary of them.

On September 15th, 1897, appellants imported and entered for consumption at the port of New York certain woven fabrics in the piece composed of silk and cotton. Such fabrics were provided for in paragraph 387, Schedule L, of the Tariff Act of July 24th, 1897.

That paragraph is set out in full in the record (fols. 2 and 3), and it will be unnecessary to reproduce it here. It will be sufficient to state that it provides an elaborate scheme of specific duties for goods of this character, the rates varying from 50 cents to $4.50 per pound, depending upon the weight of the fabric, the percentage of silk contained in it, its color, its mode of manufacture, &c. The paragraph concludes with a provision which reads as follows:

> "But in no case shall any of the foregoing fabrics in this paragraph pay a less rate of duty than 50 per centum *ad valorem*."

The appraiser returned the merchandise as manufactures of silk and cotton in the gum, silk under 20 per cent. (Record, fol. 2). The entry was liquidated November 8th, 1897 (Record, fol. 3), and the collector assessed upon the merchandise a duty of 50 cents a pound under paragraph 387, above referred to.

On the last item of the invoice the appraiser made an addition of Fcs. .09 per meter to make market value. The merchandise had been entered at the invoice value, and this addition made the appraised value exceed the value declared in the entry (Record, fol. 3).

The duty of 50 cents a pound assessed by the Collector is conceded to be correct by appellants. But in addition to this duty the Collector levied an additional duty of one per cent. of the total appraised value for each one per cent. that said appraised value exceeded the value declared in the entry. It is this latter exaction which is contended by the appellants to have been unwarranted and illegal.

The provision of law under which it is sought to justify this exaction of additional duty (Section 7 of the Customs Administrative Act of June 10th, 1890, as amended by Section 32 of the Tariff Act of July 24th, 1897), is set forth in full in the record (fols. 4 and 5). It will be unnecessary to reproduce the whole

section here. The particular part thereof relied upon by the appellee is as follows :

> " And if the appraised value of any article of imported merchandise subject to an *ad valorem* duty or to a duty based upon or regulated in any manner by the value thereof shall exceed the value declared in the entry, there shall be levied, collected and paid in addition to the duties imposed by law on such merchandise, an additional duty of one per centum of the total appraised value thereof for each one per centum that such appraised value exceeds the value declared in the entry."

In due time the importers lodged a protest against the exaction of this additional duty, which protest is set forth in full in folio 6 of the record, the vital part thereof being as follows :

> " Claiming that as said merchandise, having regard either to its invoice, entered or appraised value, was not subject to an *ad valorem* duty or to a duty based upon or in any manner regulated by the value thereof, but on the contrary was subject to specific duties, you had no right to levy any additional duty thereon under Section 7 of the Act of June 10th, 1890, as amended by Section 32 of the Act of July 24th, 1897."

The protest was transmitted to the Board of General Appraisers, and the decision rendered by a majority of that board affirmed the Collector's action. One general appraiser dissented (Record, fol. 7). His dissenting opinion will appear in the appendix to this brief.

On appeal the U. S. Circuit Court for the Southern District of New York affirmed the decision of the Board of General Appraisers. An appeal was thereupon taken to the Court of Appeals, and that Court has certified the case to this Court.

The Questions to be Decided.

The questions certified to this Court are as follows:

FIRST. Under the provisions of paragraph 387 of the Act of July 24th, 1897, and Sec. 7 of the Act of June 10th, 1890, as amended by Sec. 32 of the Act of July 24th, 1897, was the merchandise in suit subject to an *ad valorem* duty, or to a duty based upon or regulated in any manner by the value thereof?

SECOND. Did the additional duty of one per centum of the total appraised value of said merchandise for each one per centum that such appraised value exceeded the value declared in the entry, as applied to the particular article in said invoice undervalued, as aforesaid, accrue according to the provisions of Section 7 of the Act of June 10th, 1890, as amended by Section 32 of the Act of July 24th, 1897?

POINTS.

I. The exaction of the additional duty is not justified by the language of the statute.

The fundamental error which underlies the contention of the appellee in this case is the assumption that the provision of Section 7, "subject to an *ad valorem* duty or to a duty based upon or regulated in any manner by the value thereof," relates to merchandise as a class or to particular kinds of merchandise as described in the various paragraphs of the Tariff Act, and that, if any merchandise is provided for or described in a paragraph of the tariff which contains a proviso whereby under certain circumstances or contingencies such merchandise as is described in the paragraph might become chargeable with an *ad valorem* duty, then,

whenever such merchandise as may be described in such a pargraph is imported and its value advanced by the appraiser, although such advance does not render it liable to an *ad valorem* duty, the Collector is justified in taking an additional duty under Section 7. But if the language of the provisions for additional duties be examined with care it will be seen that this is an utter misconception. The language is: "*if the appraised value* of *any article of imported merchandise* subject to an *ad valorem* duty or to a duty based upon or regulated in any manner by the value thereof shall exceed the *value declared in the entry*, there shall be levied, collected and paid in addition to the duties imposed by law on such merchandise an additional duty of one per centum," &c. It is quite clear that this language does not refer to merchandise as a class, or to paragraphs of the Tariff Act, but to the particular article of merchandise imported. To justify the assessment of the additional duty the following facts must exist:

FIRST. An article must have been imported.

SECOND. It must have been entered.

THIRD. It must have been appraised.

FOURTH. The appraised value must exceed the entered value.

FIFTH. The article of imported merchandise must be subject to an *ad valorem* duty or to a duty based upon or regulated by its value.

It is the duty to which the merchandise *is* subject which is to be considered, and not the duty to which it might be subject if it were in some other condition or had some other appraised value. In other words, this statute is addressed to the collector when he comes

to liquidate the entry, and in effect says to him: "If you assess upon this merchandise an *ad valorem* duty or a duty based upon or regulated by its value, then you shall, if its appraised value exceeds its entered value, assess the additional duties provided for in Section 7. If, however, in liquidating the entry you impose upon the merchandise a duty which is not an *ad valorem* duty or which is not in any manner based upon or regulated by the value, the additional duty provisions of Section 7 have no application to such merchandise."

Merchandise generally or considered in the abstract has not an entered value nor an appraised value. Merchandise generally or considered in the abstract is not entered or appraised. Specific articles of merchandise are entered and are appraised, and unless such specific articles have imposed upon them *ad valorem* duties or duties regulated by the value, the inquiry whether the appraised value exceeds the entered value is immaterial.

The whole language of the paragraph shows this to be the correct construction. The beginning of the paragraph provides that, when the importer makes an entry of purchased goods he may make such addition in the entry to the invoice value as will in his opinion raise the same to the actual market value. And the proviso immediately following the language which the Court is now asked to construe makes this even more clear when it provides that "*the additional duty shall only apply to the particular article or articles in each invoice that are so undervalued,* and shall be limited to 50 per cent. of the appraised value of such article or articles. Thus it is clear that if a case on the invoice contains 10 pieces of silk woven fabric, each of a different number, quality, width, color or price, so that they are separately specified in the invoice, and one of them only is found to be undervalued, the additional duty could be imposed only on that one price, notwithstanding the articles were all silk woven fabrics in the piece and all to be classified and assesed under

paragraph 387. When this language is carefully analyzed and considered it must be perfectly clear that the language providing for the imposition of additional duty applies not to the class of merchandise or any sub-class or species of merchandise, but to the particular merchandise invoiced, entered and appraised, and *unless that specific merchandise is subject* (not might be subject, or could possibly have been subject) *to an ad valorem duty or to a duty based upon or regulated by its value, no additional duty can properly be imposed.*

It is an error to assume that the words "a duty based upon or in any manner regulated by the value thereof," necessarily refer to the provisos in various paragraphs of the Tariff Act declaring that the duty should not be less than a certain percentage *ad valorem.* The language not only does not necessarily mean this, but it does not mean this at all, and was not inserted for this purpose. It was inserted solely for covering merchandise which, while not subject to a certain percentage of duty to be multiplied by the value, was *subject to a duty which varied or was graduated according to its value per unit, such as a pound or square yard.* Instances of such provisions in the Tariff Acts of 1897 are as follows: Paragraph 128, providing for hoop iron; paragraph 135, providing for various articles of steel; paragraph 153, providing for pound duties on cutlery, according to value; paragraph 318, providing for cotton hosiery; paragraph 319, providing for cotton underwear; paragraph 366, providing for cloths and knit fabrics; paragraph 367, providing for blankets and flannels; paragraph 368, providing for women's and children's dress goods; paragraph 396, providing for printing paper, and many others. Any one of these paragraphs will serve for purposes of illustration. For example paragraph 367, which reads as follows:

> "On blankets and flannels for underwear composed wholly or in part of wool, valued at not

more than forty cents per pound, the duty per pound shall be the same as the duty imposed by this Act on two pounds of unwashed wool of the first class, and in addition thereto thirty per centum *ad valorem;* valued at more than forty cents and not more than fifty cents per pound, the duty per pound shall be three times the duty imposed by this Act on one pound of unwashed wool of the first class, and in addition thereto thirty-five per centum *ad valorem.* On blankets composed wholly or in part of wool, valued at more than fifty cents per pound, the duty per pound shall be three times the duty imposed by this Act on one pound of unwashed wool of the first class, and in addition thereto forty per centum *ad valorem.* Flannels composed wholly or in part of wool, valued at above fifty cents per pound, shall be classified and pay the same duty as women's and children's dress goods, coat linings, Italian cloths and goods of similar character and description provided by this Act: Provided, that on blankets over three yards in length the same duties shall be paid as on cloths."

It was to insure the correct invoicing of such articles as these, where the value must in *every instance* be a factor in determining the rate of duty, and to prevent undervalutions of such goods from escaping additional duty, that the words were inserted "or to a duty based upon or in any manner regulated by the value thereof."

The latter part of the section now before the Court enforces the correctness of our contention as to the correct interpretation of the language. The section goes on to provide, "that if the appraised value of any merchandise [note that this language is broader than that which the Court is called upon to construe in this particular case] shall exceed the value declared in the entry by more than 50 per cent., except when arising

from a manifest clerical error, *such entry shall be held to be presumptively fraudulent*, and the collector of customs shall *seize* such merchandise and proceed as in case of forfeiture for violation of the customs laws, and in any legal proceeding that may result from such seizure the undervaluation as shown by the appraisal shall be *presumptive evidence of fraud*, and *the burden of proof shall be on the claimant* to rebut the same, and *forfeiture shall be adjudged unless he shall rebut such presumption of fraudulent intent by sufficient evidence.* The forfeiture provided for in this section shall apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles in each invoice which are undervalued." If this language is to receive the construction contended for by the appellee, then if one item in a case of merchandise upon which a purely specific duty is levied in the liquidation is advanced by the appraiser more than 50 per cent., although the undervaluation could not and does not affect the rate of duty, and, therefore, no evil intent can be or is imputed to the importer, the whole case must be seized, the transaction is presumptively fraudulent, and the Secretary of the Treasury is forbidden to remit the forfeiture, although the United States did not and could not lose a dollar by the transaction. Can the language of Congress receive such a judicial interpretation, involving such consequences, while there is any other rational and sensible interpretation which might be put upon it?

We submit that the only reasonable interpretation of Section 7, as amended, is that when, upon the liquidation of an entry, the Collector imposes in accordance with law upon the specific items of merchandise covered by and described in the entry *ad valorem* duties, or duties based upon or in any manner regulated by the value, then he shall, if those items of merchandise are undervalued, impose an additional duty of one per cent. for every one per cent. of under-

valuation, but that when the duties imposed upon the specific merchandise in accordance with law are purely specific duties, no additional duty can be imposed for undervaluation.

It is, of course, conceded by appellants that where the Appraiser's advance is such as to make a specific duty leviable under par. 387 less than 50 per cent., so that the merchandise becomes subject to and is assessed with a duty of 50 per cent. *ad valorem* under the proviso, the additional or penal duty attaches because the merchandise is then, in fact, subject to an *ad valorem* duty.

II.

The construction placed upon this paragraph by the Collector and Board of General Appraisers is contrary to the spirit and intent of the legislation.

In the case of Passavant vs. U. S., 148 U. S., 214 (at p. 211), the Supreme Court says:

> "As stated by Mr. Justice CAMPBELL, speaking for the Court, in Bartlett vs. Kane, 16 How., 263, 274, such additional duties 'are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud.' *They are designed to discourage undervaluation upon imported merchandise and to prevent efforts to escape the legal rates of duty.* It is wholly immaterial whether they are called additional duties or penalties."

The same view has repeatedly been affirmed in other decisions of the Court and in opinions of the Attorney-

General. The object of the law is to secure correct valuations, and to punish fraud or negligence whereby the Government might suffer loss. No such loss can possibly occur where the goods, had they been entered at the appraised value, would nevertheless have been subject to purely specific duty. If an importer buys goods abroad at a foreign price equivalent to a dollar a pound, which goods are made by law subject to a duty of 75 cents a pound, with the proviso that the duty shall not be less than 50 per cent. *ad valorem*, he knows that the valuation of the goods is immaterial to the amount of duty unless the value should be found to be more than $1.50 a pound. If his knowledge of the foreign market value is such that he knows of no such goods that have ever been sold for $1.50 per pound or anywhere near it, and that on no conceivable theory could a competent appraiser appraise them as high as $1.50 a pound, why should he be required to pursue an investigation and inquiry as to whether other foreign vendors ask $1.02, $1.04 or $1.06 a pound? The goods would pay the same duty whether valued at $1 or $1.25 a pound. If a market value was a fixed, unvarying and notorious thing, such as a man could inform himself of in the same way as he would inform himself of the day of the week or the number of miles between two points on a map, it might not be much of a hardship to require him to have the mathematical market value in his invoice and impose a penalty on him if he did not have it. But a market value is not a fixed, unvarying and notorious thing, even where goods are publicly sold in one common mart or exchange, such as the wool market of Liverpool and the wheat market of New York and Chicago. Prices fluctuate from day to day and from hour to hour. Men who wish to keep posted as to the price of securities have to stand over a ticker. If Hoeninghaus & Curtiss bought silk goods from a manufacturer in Lyons or Roubaix, they could not tell without considerable inquiry what other manufacturers in these or other

places in France were asking for the same goods, even if it could be assumed that any other manufacturer sold precisely the same goods, which is very often far from being the case. The whole theory of the penalty or additional duty legislation is that it is a rough, harsh and more or less unjust attempt to prevent undervaluations whereby the revenue might suffer, and that, while hardship may result to the importer in individual cases, some strict requirement of this character is necessary to protect the revenue. But why should courts be asked to extend these harsh and cruel provisions of law to cases where they are not necessary to protect the revenue, but where, on the contrary, the revenue has not and could not suffer anything by the undervaluation? The word "undervaluation" is used simply for conciseness and brevity. It is really in many instances a misnomer. Goods are quite as often overvalued by the appraiser as they are undervalued by the importer. Advances to entered value made upon appraisement amount in many cases to a mere difference of opinion between the appraiser and the importer. Of course, the collection of the Government revenues requires that the opinion of the appraiser and not that of the importer shall be adopted in the liquidation. The additional duty the importer has to pay is in many instances the penalty of a difference of opinion between him and the appraiser. The peculiar cruelty and injustice of the present case consists in the fact that this penalty or additional duty is imposed upon the importers for *a difference of opinion with the appraiser on an immaterial point*, since whether the value be as he entered it or as the appraiser found it the duty assessable by law upon the goods is precisely the same.

The cruelty and injustice of the position contended for by the Government is increased by the change in the law, whereby a margin for difference of opinion between the appraiser and importer of 10 per cent. is wiped out, and every one per cent. of advance carries

with it one per cent. of additional duty. Section 7, as it read prior to the amendment made by Section 32 of the Tariff Act of July 24th, 1897, did not subject goods to additional duty for undervaluation unless the appraised value exceeded the entered value by 10 per cent.; whereupon an additional duty of two per cent. was levied for every one per cent. of undervaluation. The amendment makes the goods subject to additional or penal duties if there is any excess of the appraised value over the entered value, and makes the additional duty one per cent. for each one per cent. of advance instead of two per cent. It is harsh enough for the Government to say to the importer: "If our appraiser differs with you by one per cent. in your estimate of the market value of goods which are subject to *ad valorem* duties we will not only assess the *ad valorem* rate upon his valuation rather than yours, but we will impose upon you an additional duty of one per cent. for every one per cent. that his opinion differs from yours." But, if the contention of the Government in the case at bar is to be sustained, then its position is substantially this: "Mr. Importer, your goods are subject to a specific duty per pound or per yard; if their value had been appraised at 25 per cent. more than the value at which you entered them, they would still be dutiable at the same specific duty per pound or per yard. Whether the appraiser is right as to the value, or whether you are, is not of the slightest consequence in determining the duty leviable by law upon the goods. Nevertheless, for every one per cent. by which his estimate differs from yours, we will impose upon you an additional tax of one per cent."

It is matter of public knowledge that not only importers, but general appraisers and officers of the treasury protested against the entire abolishment of a margin for differences of opinion between the appraiser and the importer as to the valuation of *ad valorem* goods. If it is to be held that Congress meant by its

legislation not only to abolish any margin for difference of opinion, but to make goods not subject to any *ad valorem* duty become subject to a penalty or additional duty because of a difference of opinion between the appraiser and the importer as to their value, *a point utterly immaterial in liquidation*, then this legislation is unparalleled for cruelty and injustice in the history of this country. Such legislation would shock the moral sense, and nothing but the absolute impossibility of finding any other construction consistent with the language used should justify any Court in imputing such an intent to Congress.

III.

The construction of the statute contended for by the Government is contrary to public policy.

This is always a proper subject for consideration where there is any doubt as to the true construction of a statute. In the absence of the most imperative and unambiguous language, a construction should not be adopted which will lead to mischief and confusion. Such a result must inevitably attend the construction of the statute by the Collector and Board of General Appraisers.

One of these mischiefs will be a multiplicity of reappraisements. The general appraisers and the Board of General Appraisers will be repeatedly called upon to review the action of appraising officers in advancing values on goods paying specific duty. It would seem that there were quite enough reappraisements to tax the energy and industry of general appraisers on goods paying *an ad valorem* duty, without imposing upon

them the additional burden of *holding reappraisements which can result in no change of the regular duties to which the merchandise is subject*, solely for the purpose of determining what, if any, additional or penal duties can be imposed upon such merchandise. Suppose in the case at bar the importers had called for a reappraisement before one general appraiser, and ultimately by a board of three general appraisers, to determine whether the appraiser's advances were justified, the specific duty to which alone the goods were subject would in no wise be affected by these reappraisements. The general appraisers would be simply investigating the question whether or not these importers should be mulcted in a penalty. This would not be what they were doing in form, but it would really be the only practical question for them to decide. Can it be conceived that Congress intended that an appraising officer who is satisfied at once and without any doubt that the foreign value of merchandise is below the line which would bring it up to the *ad valorem* rate should go on investigating its market value and carefully determining the same, not because of any effect his determination might have upon the regular duty to which the goods were subject, but for the sole purpose of determining whether the importers could be mulcted in a penalty for undervaluation? Such a theory is inconsistent with the whole character and purpose of the revenue laws from the beginning of the Government.

The section of the law (Section 13) providing for reappraisement indicates clearly the contingency under which the law contemplated reappraisements. The section provides that the decision of the Appraiser shall be final as to the *dutiable value* of merchandise unless there is a reappraisement. In case of a reappraisement before one General Appraiser his decision is to be final as to the *dutiable value* of the merchandise unless there is a reappraisement before a board of three General Appraisers, in which case their decision is to be final as to *dutiable value*. The words

" dutiable value " mean the value upon which, or according to which, the rate of duty is to be assessed. Merchandise subject to specific duty has no dutiable value. Yet, if the appraiser's advances to the value of goods subject to purely specific duties is to carry with it the imposition of additional duty, of course, importers will be obliged to call for reappraisements in order to have the correctness of his decision reviewed. Merchandise is imported into the United States at many different ports. The General Appraisers are located at New York, and it is rarely that one of them is sent to other ports to hold reappraisements. The capacities of these officers are taxed to the utmost to hold reappraisements upon goods which pay duty according to their value. Surely a Court should hesitate to give a construction to the law which would impose upon them the additional burden of holding reappraisements upon goods which pay a purely specific duty.

Another mischief which will attend the construction of this statute against which we contend is the temptation to overvaluation and the consequent confusion attending the determination of market value. There is no penalty for overvaluing goods, except that, where the duty upon them is an *ad valorem* duty, duty cannot be assessed upon less than the entered or invoiced value. But if the goods are subject to specific duty there is nothing to prevent a merchant from invoicing or entering them at a higher price than their real value, in order to avoid the imposition of additional duty. Where the duty is specific, with a provision that it shall not be less than 50 per cent. *ad valorem*, an importer might escape all risk of additional duty by entering his goods at a much higher value than their real value, stopping just short of the point which would throw them into the *ad valorem* class. The result of this would be that *invoices supposed to represent actual transactions, which have always been the best evidence on which the appraiser could rely for information as to*

foreign value, would cease to be reliable. The consequence would be great confusion and uncertainty in the appraisement of merchandise.

The whole theory of the revenue system requiring invoices of goods purchased to be made out at the price actually paid, and invoices of goods consigned to state the actual market value, with the privilege to the importer, as to purchased goods, of making additions on entry if he thinks the price he paid is less than the market value, is based on the *importance to the correct appraisement of imports of having invoices and entries truly and correctly represent market values*, in order that the appraising officers, by comparing the entries and invoices of one importer with those of another, may arrive at accurate conclusions as to foreign prices. The law contemplates that these documents shall show foreign prices; *no less and no more.* Any system which will result in making these documents unreliable, in having them state fictitious and inflated values for the purpose of avoiding additional duties, is a public mischief and contrary to public policy. As to goods which pay duty according to their value, this mischief is prevented by the provision of law that duties shall not be assessed upon less than the invoice value; but, as to goods which do not pay duty according to the value, but according to their measurements or weights, there is nothing to prevent this mischief, and there will be everything to induce and encourage it, if, by resort to it, importers may escape the payment of additional duties or penalties on goods paying specific duties.

IV.

The construction of the statute now contended for by the appellee is contrary to previous rulings of the Treasury Department and of the Department of Justice.

The precise question involved in this case was submitted to the Attorney-General by the Secretary of the Treasury in 1878. The opinion of the Attorney-General is found in 15 Op. Att. Gen., 656. For convenience of reference a copy of it will be found in the appendix. It will be noted that the opinion refers to a previous ruling that merchandise paying a purely specific duty was not liable to the said additional or penal duty, although no distinction was made in terms by Section 2900 of the Revised Statutes between goods subject to an *ad valorem* duty and those subject to a purely specific duty. The opinion then goes on to show that the collector had contended in the case under consideration that, by reason of a proviso that "no brandies, spirits or other spirituous beverages under first proof, shall pay a less rate of duty than 50 per centum *ad valorem*," and of the fact that the brandy was below the degree of first proof, it was not absolutely subject to a purely specific duty. This, it will be observed, is the same contention that is now made here by the appellee. The Attorney-General then notes the fact that "notwithstanding the advance in value the brandy was liable only to the specific duty of $2 a gallon." This makes the case precisely parallel with the case at bar. He then goes on to say :

> "The undervaluations to which, in practice, the penalty of 20 per cent. has been applied have been, and for good reasons, *such as were made in order to defraud the Government of revenue.* This is not true of undervaluations of articles subject to a

specific tax, and therefore not of undervaluations of *brandy in general; i. e.*, of any brandy, except such as, being under first proof, is also by appraisement worth more than four dollars per gallon."

Section 564 of the Treasury Regulations of 1884 was as follows:

> "ART. 564. Merchandise paying a purely specific duty is not liable to the additional duty of 20 per cent. *ad valorem* imposed by Section 2900, Revised Statues; but, if the specific duty is at all dependent upon value, as in the case of steel bars, which are dutiable at a certain sum a pound, according to the value of the steel, the additional duty attaches if the merchandise is advanced 10 per cent. or more. (S. 3335, 3370, 3483, 3519.)"

Substantially the same language is found in paragraph 894 of the Treasury Regulations of 1893.

In view of the fact that all these rulings were made under statutes which provided for the assessment of the additional or penal duty whenever "the appraised value of any article of imported merchandise shall exceed," &c., is it reasonable to contend that, when Congress inserted after the word "merchandise" the words "subject to an *ad valorem* duty, or to a duty based upon, or in any manner regulated by, the value thereof," they intended by this qualifying language to make the provision broader than it had been held to be before by the Treasury Department and the Department of Justice?

On the contrary, is not the inference irresistible that they wished to negative the claim that had been made under the Tariff Act of 1890, that the goods provided for in a paragraph containing a minimum *ad valorem* rate were subject to *ad valorem* duty on advance of valuation, notwithstanding the advance did not make them liable to other than specific duties?

V.

Any doubt as to the construction of the statute should be resolved in favor of the importer.

This salutary principle has been repeatedly affirmed by all the Federal Courts.

Adams vs. Bancroft, 3 Sumn., 387.
U. S. vs. Wigglesworth, 2 Story, 373.
Powers vs. Barney, 5 Blatch., 203.
U. S. vs. Isham, 17 Wall., 504.
Hartranft vs. Weigmann, 121 U. S., 616.
Ross vs. Barland, 1 Peters, 667.
Hedden vs. Iselin, 31 Fed. Rep., 269, top.
American Net and Twine Co. vs. Worthington, 141 U. S., 468.
McCoy vs. Heduen, 38 Fed. Rep., 89.
Henderson vs. U. S., 26 U. S. App., 538.
Matheson vs. U. S., 38 U. S. App., 25.

We know of no case in which it may be more properly invoked than the case at bar, where it is re-enforced as it is by every consideration of justice and sound public policy. The construction of the statute for which we contend is not only consistent with the letter of the law, but we submit that we have shown that any other construction is inconsistent with the spirit of the law and with public policy. The construction most favorable to the importer should therefore be adopted.

VI.

The questions certified should both be answered in the negative.

Dated New York, January 6th, 1899.

CHARLES CURIE,
Attorney for Appellants.

W. WICKHAM SMITH,
Counsel.

APPENDIX.

Opinion Attorney-General.

DUTY ON BRANDY.

The additional duty of 20 per centum *ad valorem*, which is imposed by section 2900, Rev. Stat., by way of a penalty for undervaluations, can have no application to an undervaluation of brandy where the brandy, being under first proof, is by appraisement worth not above four dollars per gallon.

DEPARTMENT OF JUSTICE,
FEBRUARY 9, 1878.

SIR—Yours of the 30th ultimo, addressed to the Attorney-General, states for his consideration the following case and questions:

> "Messrs. Cook & Bernheimer imported into the port of New York one hundred cases of brandy, which was invoiced and entered at the custom house at a value of 20 francs per case, or about 9 francs per gallon. The appraiser reported that the strength of the brandy was below the degree of first proof, and that the correct value thereof was 24 francs per case. From this advance over the entered value an appeal was taken for reappraisement in the manner provided by section 2930 of the Revised Statutes. The value found on such reappraisement was 22 francs per case. This advance was 10 per cent. more than the invoice and entered value. The collector of customs thereupon, in addition to the regular duties, assessed a duty of 20 per centum *ad valorem* on said brandy under Section 2900, Rev. Stat., which provides that 'when the appraised value

shall exceed by 10 per centum or more the value so declared in the entry, then, in addition to the duties imposed by law on the same, there shall be collected a duty of 20 per centum *ad valorem* on on such appraised value.'

" The importers duly protested and appealed to this Department against the assessment of such additional or penal duty, claiming that brandy under the statute pays a specific duty, and that the case did not come within the provisions of the section of law above quoted.

" Although no distinction is made in terms by said section between goods subject to an *ad valorem* duty and those subject to a purely specific duty, this Department has heretofore held that merchandise paying a purely specific duty is not liable to the said additional or penal duty.

" The existing provisions of law on the subject will be found in Schedule D, Section 2504, Revised Statutes, and are as follows :

" 1st. ' Brandy, and on other spirits manufactured or distilled from grain or other materials, and not otherwise provided for, $2 per proof gallon. Each and every gauge or wine gallon of measurement shall be counted as at least one proof gallon.' * * * This was taken from the twenty-first section of the Act of July 14, 1870, and was in force on the 1st of December, 1873 ; and

" 2d. ' No lower rate or amount of duty shall be levied, collected and paid on brandy, spirits and other spirituous beverages than that fixed by law for the description of first proof, but it shall be increased in proportion for any greater strength than the strength of first proof ; and no brandy, spirits or other spirituous beverages under first proof shall pay a less rate of duty than 50 per centum *ad valorem*.' * * * This latter provision was taken from Section 2 of the Act of June

30, 1864, which imposed a duty of $2.50 per gallon on brandy and spirits at proof and under, which rate was repealed by the Act of 1870 aforesaid.

"It is under the last clause that the collector of customs at New York took the ground that the brandy in question was not absolutely subject to a purely specific duty; but it may be stated that the brandy in question, notwithstanding its advance in value, was liable only to the specific duty of $2 per gallon.

"The questions upon which your opinion is desired are: First, whether the duty of 50 per cent. on spirits, under first proof, is to be recognized as a legal one, in view of the provision in Schedule D, that each and every guage or wine gallon of measurement shall be counted as at least one proof gallon; and, second, if the validity of such duty shall be recognized, whether the 20 per cent. additional duty was properly assessed."

The practical construction by which the Act of 1870, cited above, was held, previously to the enactment of the Revised Statutes, to repeal the Act of 1864, upon the same subject, seems to have been probably correct. I say *probably*, because the question now before you renders it unnecessary to pronounce more definitely thereupon. If there were a repeal, it remains unaffected by the circumstances that *both* provisions have been brought forward into the Revised Statutes. For they are brought forward with the same effect as they had previously, *i. e.*, as being in conflict; that of 1870 remaining an expression of the latest will of Congress. The face of the record (in the Revised Statutes) still show as much as before (in the Statutes at Large) that the Act of 1864 had been repealed, and therefore that its reproduction is an inadvertence.

But it is unnecessary to decide absolutely that the Act of 1870 repealed that of 1864. For, if the *ad valorem* tax mentioned at the close of the language

quoted by you from Section 2504 has been applicable to any importations since the passage of the Act of 1870, it certainly has not been to an importation of a brandy which, when properly appraised, was worth no more than four dollars per gallon, which is the case of the brandy now in question.

The undervaluations to which, in practice, the penalty of 20 per cent. has been applied, have been, and for good reasons, such as were made in order to defraud the Government of revenue. This is not true of undervaluations of articles subject to a specific tax, and therefore not of undervaluations of *brandy in general; i. e.*, of any brandy, except such as, being under first proof, is also by appraisement worth more than four dollars per gallon.

I, therefore, answer the second question put by you in the negative. This, as I have before said, renders it unnecessary to say more about the first question.

With great respect, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

THE SECRETARY OF THE TREASURY.

Approved.

CHAS. DEVENS.

Dissenting Opinion by Tichenor, General Appraiser.

I am persuaded that, if Section 7 of the Act of June 10, 1890, as considered by the Court of Appeals in the Pings & Pinner case, had been the same as that now in force, and if the considerations of law, justice and public policy which have been brought to the attention of the board by the brief of counsel in this case had been presented to the Court, the conclusion in that case would have been different. In this view, I must

dissent from the conclusions reached by my colleagues in this case.

It is presumed that in framing the Customs Administrative Act of June 10, 1890, the Congress had in mind the then existing Tariff Act of 1883, which did not contain any provision like that under which this case arose; in other words, no provision to the effect that an article subject to a purely specific rate of duty per unit of quantity should not pay less than a certain rate *ad valorem*. That act provided in certain cases for mixed or compound rates, where the duty was based upon or regulated by the value, such, for example, as the duty on cotton thread and yarn (paragraph 318), where the specific rate per pound was dependent upon the value; also on cotton cloths (paragraphs 320 and 321), which were subject to an *ad valorem* rate if of certain specified values.

The question had been frequently raised whether the additional or so-called penal duty provided for in Section 2900 of the Revised Statutes was limited to merchandise subject to a purely *ad valorem* rate of duty, or included merchandise subject to mixed or compound or specific rates of duty, and whether the provisions of law in relation to market and dutiable value were applicable to merchandise where the specific rates imposed were dependent upon the value. The Treasury Department had repeatedly held (and this view was concurred in by the Attorney-General) that the additional or penal duty referred to did not apply to merchandise which had been assessed at purely specific rates.

The particular purpose of Section 19 of the Act of June 10, 1890, was to define the market and dutiable value of imported merchandise, and the use of the words "or to a duty based upon or regulated in any manner by the value thereof" was obviously for the purpose of making clear what had been before doubtful and the subject of dispute. It is assumed that these words were inserted in Section 7 of the act

by the amendment in Section 32 of the Act of July 24, 1897, for a like purpose. They necessarily imply that the additional or penal duty *is not applicable to merchandise subject to purely specific duty*, thus differing radically from the original section, considered by the Court in the Pings & Pinner case, where it was held that no distinction was made between merchandise subject to specific and *ad valorem* rates. This provision (Section 32 of the present act) does not refer to the *rate*, nor to *classes of merchandise*, but to the *duty* found to be due upon appraisement upon individual articles or particular importations of merchandise.

The duty levied and assessed in this case was *purely specific;* to wit, 50 cents per pound. That rate being equal to or in excess of 50 per cent. *ad valorem*, the condition upon which the *ad valorem* duty was contingent did not arise. Consequently, the merchandise did not become subject to a duty "based upon or regulated in any manner by the value thereof," any more than if paragraph 387, under which duty was assessed, had simply read:

> "Woven fabrics in the piece, not specially provided for in this act, weighing not less than one and one-third ounces per square yard, and not more than eight ounces per square yard, and containing not more than twenty per centum in weight of silk, if in the gum, fifty cents per pound."

As stated by Mr. Justice CAMPBELL, speaking for the Supreme Court, in Bartlett vs. Kane (16 How., 263, 274), such additional duties "are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud." There can certainly be no just purpose in imposing an additional, exemplary or penal duty where, as in this case, no advantage is sought or secured, no evasion attempted or accomplished, and where the Government has not been

deprived of any portion of its lawful duties, nor injured in any way.

It has been held by the Attorney-General and the Treasury Department that the additional duty in question is a penalty (Treasury Synopsis 15,946). Whether it is or not, it seems to me that this is a case where the rule of construction that all doubts should be resolved in favor of the citizen and against the Government is peculiarly applicable (United States vs. Wigglesworth, 2 Story, 369; Net and Twine Company vs. Worthington, 141 U. S., 468, 474). A payment has been exacted from the protestants, by a summary process, in excess of the duties regularly prescribed by law, and irrespective of good or bad faith on their part.

I am of the opinion that the protest in this case should be sustained.

(Signed) GEO. C. TICHENOR,
General Appraiser.